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Horace LaFayette Wilgus
University of Michigan Law School

Joseph H. Drake
University of Michigan Law School

Lester E. Waterbury
University of Michigan Law School

Louis Kawin
University of Michigan Law School

ralph W. Aigler
University of Michigan Law School

See next page for additional authors

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Authors

Horace LaFayette Wilgus, Joseph H. Drake, Lester E. Waterbury, Louis Kawin, ralph W. Aigler, and Rolla L. Carpenter

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NOTE AND COMMENT

LIABILITY OF MANUFACTURER TO REMOTE VENDEE FOR DEFECTIVE AUTOMOBILE WHEEL.—Plaintiff, in February, 1909, purchased from the Utica Motor Car Company, a Cadillac six-passenger touring car, manufactured by the Cadillac Motor Car Company, of Michigan. The Utica company was a dealer in motor cars, and purchased to resell; it was the original vendee, and the plaintiff was the sub-vendee.

The car was used very little until July 31, 1909, when the plaintiff, an experienced driver, while driving the car on a main public road in good condition, at a speed of 12 to 15 miles per hour, was severely and permanently injured by the right front wheel suddenly breaking down and the car turning over on him.

He commenced action in the Supreme Court of New York in 1910. This was removed to the Federal Court for the Northern District of New York, where he had judgment for $8,000. This was reversed by the Circuit Court of Appeals, (LaCombe, Coxe, and Ward, JJ.), in an opinion by Ward, J., Coxe, J., dissenting, (221 Fed. 801, 1915).

The action was tried again, without a jury. The court found that the injuries were caused by the negligence of the defendant; that the plaintiff

was free from contributory negligence; and that the damages amounted to $10,000. Yet, relying on the former decision of the Court of Appeals, the court gave judgment for the defendant. The court also found: that the automobile was manufactured, assembled, and put on the market by the defendant with a weak and defective wheel; that this was the proximate cause of the accident; that the car when put on the market, was dangerous to human life; that defendant ought to have known this, and had it exercised ordinary care would have known it; that although the defendant did not manufacture, but purchased, the wheels, it carelessly failed to use reasonable inspection and tests to discover the real condition and weakness of the wheels.

The complaint was based on negligence only. There was no allegation of fraudulent representations by the defendant. Evidence, however, was admitted to the effect, and the judge found, that the defendant, in its catalogue represented that its cars were equipped with the best wheels obtainable, equal to those used on the highest priced cars; of the artillery type, made from well seasoned second growth hickory, with steel hubs and spokes of ample dimensions to insure great strength; and that the plaintiff relied on these representations.

On the former appeal, the question was the same as here, i. e., whether the defendant owed a duty of care to the plaintiff, not being the immediate purchaser, but the sub-vendee, and it was held that since there was no contractual relation between the plaintiff and the defendant, there could be no recovery. The court then said: "One who manufactures articles inherently dangerous, e. g., poisons, dynamite, gunpowder, torpedoes, bottles of water under gas pressure,—is liable in tort to third parties which they injure, unless he prove that he has exercised reasonable care with reference to the article manufactured. * * * On the other hand, one who manufactures articles dangerous only if defectively made or installed, e. g., tables, chairs, pictures or mirrors hung on the walls, or carriages, automobiles, and so on,—is not liable to third parties for injuries caused by them except in case of willful injury or fraud."

On this appeal the defendant relied on the rule "that whatever has been decided on one appeal cannot be re-examined on a second appeal in the same suit." While the court admitted this was the general rule, yet, by Rogers, J., it said this is a rule "of public policy of private peace," but not an inexorable one, "and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society. * * * We shall not consider at length the reasons which have satisfied us that a serious mistake was made in the first decision. The reasons may be found in the opinion in" *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, decided since the former decision in this case. "We cannot believe that the liability of a manufacturer of automobiles has any analogy to the liability of a manufacturer of tables, chairs, pictures or mirrors hung on the walls. The analogy is rather that of the manufacturer of unwholesome food or of a poisonous drug. It is every bit as dangerous to put upon the market an automobile with rotten spokes as it is to send out to the

trade rotten foodstuffs." (*Ketterer* v. *Armour & Co.*, 247 Fed. 921). The judgment was, therefore, reversed, Manton, J., concurring with Rogers, J., and Ward, J., dissenting, on the ground that the former decision was the law of the case and was *res judicata*. *Johnson* v. *Cadillac Motor Car Co.*, (1919) 261 Fed. 878. The opinion of Ray, J., in the District Court (194 Fed. 497), is valuable.

The history of this case illustrates the difficulty the courts have with the problem involved. Beginning with *Langridge* v. *Levy* in 1837. (2 M. & W. 519, 4 M. & W. 337). D, who falsely warranted to P's father, who purchased for use of himself and his sons, the make of a gun which burst and injured P while he was using it, was held liable to P. In *Winterbottom* v. *Wright*, (1842), 10 M. & W. 109, P, relying on a contract between D and the Postmaster General to keep in repair the mail coaches to be used by P's employer who had contracted to carry the mails, was not allowed to recover damages for an injury caused by the breaking down of the coach which P was driving, due to D's failure to keep in repair as agreed. In *Longmeid* v. *Holliday*, (1851), 6 Exch. 761, P could not recover for injury from the explosion of a defective lamp which P's husband had purchased for the use of himself and his wife, from D who did not make the lamp, know of the defect, or make any representations concerning it, although the husband had an action against D on an implied warranty that the lamp was sound. In *Thomas* v. *Winchester*, (1852), 6 N. Y. 397, P was allowed to recover for injury from taking belladonna (poison), used in a prescription calling for dandelion (harmless), filled by a retail druggist from a bottle falsely labeled 'dandelion,' purchased from a wholesale druggist, who bought from D, the manufacturer, whose employee had negligently mislabeled the bottle,—on the ground of the inherently dangerous character of the poisonous drug. These are the foundation cases.

In *Huset* v. *Threshing Machine Co.*, (1903), 120 Fed. 865, Judge SANBORN reviewed the cases, and formulated the matter thus: The general rule is that the manufacturer is not liable to third parties who have no contractual relations with him for negligence in the manufacture of the articles he handles. There are three exceptions: (1) An act of negligence of a manufacturer which is imminently dangerous to life or health, committed in the preparation of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer therefrom,—*Thomas* v. *Winchester, supra.* (2.) An owner's act of negligence causing injury to one invited to use his defective appliances on his premises makes him liable,—*Heaven* v. *Pender*, (1883), L. R. 11 Q. B. D. 503. (3.) One who delivers an article which he *knows* to be imminently dangerous to life, to another without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated. In this case the declaration alleged that P was injured by the breaking of the defective running board over the cylinder of a threshing machine which D *knew* was unsafe when he sold the machine to P's employer. This was held sufficient on demurrer,—but the court remarked that on the trial P probably would fail to prove D actually knew of the defect.

The courts have not yet arrived at any consistent theory of liability. The *Cadillac* and *Buick* cases, above, put the defective touring cars in the class of inherently dangerous things, but a Ford car is not such in Oklahoma, (*Ford Motor Car Co.* v. *Livesay,* (Okl., 1916), 160 Pac. 901). A folding bed is dangerous in California, (*Lewis* v. *Terry,* (1896), 111 Cal. 39), but an ordinary bed is not in New York, (*Field* v. *Empire & Co.,* (1918), 166 N. Y. S. 509). A buggy is not in New York, (*dicta* in *Thomas* v. *Winchester, supra*), but is in Georgia, (*Woodward* v. *Miller* (1904), 119 Ga. 618). Step-ladders are both in New York and in Minnesota, (*Miller* v. *Steinfeld,* (1917), 160 N. Y. S. 800; *Schubert* v. *Clark Co.,* (1892), 49 Minn. 331).

The *Schubert* and *Buick* cases, however, go a long way in establishing a rule that the maker of a thing to be used in a certain way, owes a legal duty to all who in the natural and ordinary course of events will probably use it in the way designed, to exercise reasonable care in its manufacture, proportioned to the danger from its use if defective, and is liable to such as are injured, when properly using it without knowledge of the defect, because of its defective condition, although the maker did not personally know of the defect, had no contract with the plaintiff, did not fraudulently deceive him, and the thing was not inherently dangerous otherwise than because of the defect. This approaches the principle stated by BRETT, M. R., (but not agreed to by the other judges), in *Heaven* v. *Pender, supra,*—"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The English courts still have difficulty with the problem. *Earl* v. *Lubbock,* [1905], 1 K. B. 253 (a van); *Blacker* v. *Lake & Elliot,* (1912), 106 L. T. 533 (a lamp); *White* v. *Steadman* [1913], 3 K. B. 340,—(a vicious horse); *Bates* v. *Batey & Co.,* [1913], 3 K. B. 351, (ginger-beer bottle); *British So. African Co.* v. *Lennon,* (1915), 85 L. J. (P. C.) 111 (poison cattle dip).

H. L. W.

CONTINUOUS TRESPASS AND REPEATED WRONG.—In the recent case of *Perkins* v. *Trueblood,* (Cal., May, 1919), 191 Pac. 642, the facts were that, in March, 1912, the defendant, a surgeon, set the leg of the plaintiff, but as the fracture did not heal satisfactorily "the defendant separated the surfaces of the bone during the month of April, 1912, and again set the plaintiff's leg." In a suit for malpractice, begun on April 9, 1913, it was *held,* that the cause of action "was not barred by the CODE OF PROCEDURE, Article 340, subd. 3, prescribing a one year limitation period in such cases." It is difficult to tell from the report of the case what the theory of the court was as to the cause of action and the running of the statute of limitation, but it is evident that the court must have considered this not a case of "continuous trespass," with the old connotation of that term, but rather as a case of "repeated wrong," and that the statute began to run not from March, 1912, when the leg was originally set, but from April, 1912, the date when it was negligently reset.

The confusion of these two phrases, above quoted, has caused the courts a great deal of trouble, but wherever the facts have been of such a nature as to allow an initial wrong with continuing results to be differentiated from an initial wrong afterwards followed by a new wrong, they have reached the conclusion found in the California case. In the English case of *Clegg* v. *Dearden,* (1848), 12 Ad. and El. (N.S.) 575, a trespasser had broken through a wall in a mine and, after the statute had run on the original trespass, water had run through the hole and injured the plaintiff. It was held in an action on the case that there could be no recovery because leaving the hole was not a continuous trespass but only the result of the initial trespass, and the running of the statute had barred that trespass together with its results. In the case of the *National Copper Co.* v. *Minnesota Mining Co.,* (1885) 57 Mich. 83 the facts were identical with those in the English case and the conclusion was the same. In the case of *Gillette* v. *Tucker* (1902) 67 Ohio St. 106, a surgeon sewed up a sponge in a wound and left it there until after the statute had run on the original negligence of sewing it in the wound. The holding in this case, finally affirmed by the Ohio court in *McArthur* v. *Bowers,* (1905) 72 Ohio St. 656, was the same as in the cases of injury to land, above cited. The injury caused by the sponge remaining in the wound was held to be the *result* of the original wrongful act and not a new wrong, and recovery was denied the plaintiff because the statute had run on the original trespass. But in the case of *Perry County* v. *Railroad Co.* (1885), 43 Ohio St. 451, it was held that "each day's failure" to restore a bridge destroyed by fault of the defendant "was a fresh breach of an obligation" so to do; i. e., the leaving the hole in the road was a "repeated wrong" each successive day that it was so left.

In line with this last decision of the Ohio court it has recently been held in *Judd* v. *Blakeman* (1917), 175 Ky. 848, that each successive overflow of the plaintiff's land, caused by the negligent construction of the defendant, gave rise to a new cause of action, each successive overflow being treated as a "repeated wrong." There was a similar holding on the same state of facts in *Scheurich* v. *Empire District Electric Co.* (Mo., 1916), 188 S. W. 114. In the case of *Dick* v. *Northern Pac. Ry. Co.* (1915), 86 Wash. 211, where there was a continuous publication of a libel, each publication was held to constitute a separate libel and therefore a "repeated wrong," for which a recovery would be had, even if more than the statutory period had elapsed since the first insertion.

It would seem wise then to bring one's suit for "repeated wrong" rather than for "continuous trespass," and this too whether the action be for an injury to land, a wrong to the person or a slander to reputation. A more extensive consideration of this subject will appear in a later issue of this REVIEW. J. H. D.

RELEASE OF PARTICULAR JOINT TORT-FEASORS—EFFECT OF RESERVATION OF STIPULATION RESERVING RIGHT OF ACTION AGAINST OTHERS.—The problem indicated by the above heading is not so simple as when Judge Cooley wrote

concerning it, "* * * and so a release of one releases all, although the release expressly stipulates that the other defendants are not to be released." COOLEY, TORTS, [3d Ed.] 236. A very considerable following has been attracted to the opposite doctrine, the latest convert being the Supreme Court of Ohio, which recently overruled its former decisions on the subject, holding that the plaintiff could, by an express stipulation in a release to two joint tort-feasors, reserve her cause of action against those not named as releasees. *Adams Express Co.* v. *Beckwith et al.*, 126 N. E. 300 (Ohio, 1919) overruling *Ellis* v. *Bitzer*, 2 Ohio 89.

The release of the comomn law is a technical affair, involving a seal and particular words. Where a technical release, absolute in its terms and under seal, is given to one of several wrong-doers it is quite uniformly held that it is a good bar to an action against those not named in the release. The reason for this is laid in the sanctity of the seal. It cannot be controverted by parol evidence. The law presumes the release was given in full satisfaction for the injury and upon sufficient consideration. 111 Am. St. Rep. 282; *Ellis* v. *Esson*, 50 Wis. 138. The cause of action being one and indivisible, a release of one destroys it. This has been carried to its logical, if unsatisfactory conclusion, by holding that it is immaterial whether or not the one released was in fact liable. *Leddy* v. *Barney*, 139 Mass. 394. But the standing of the absolute release under seal is believed not to be impregnable. In *Rosenbaum Grain Co.* v. *Mitchell*, 142 S. W. 121, (Tex.), an intsrument under seal, given on consideration of $4000, purporting to "release and forever discharge" a railroad company from all causes of action arising from certain injuries received by the plaintiff and acknowledging full satisfaction of all liability, was held not conclusive, and parol evidence was admitted to show the intention of the parties in making the release. It was left to the jury to decide whether or not the release of all joint tort-feasors was intended. See further *El Paso and S. R. Ry. Co.* v. *Darr*, 93 S. W. 166 (Tex.); *City of Covington* v. *Westbay*, 156 Ky. 839.

Although the operation of an absolute release under seal is well-settled, the effect to be given to a reservation of a right of action against those not released is a moot point. By one line of authorities all are released, as the reservation is considered repugnant to the spirit of the release and void, because "* * * his own deed shall be taken most strongly against himself." 2 CO. LITT. § 376. This is the reasoning applied in *Gunther* v. *Lee*, 45 Md. 60, a leading case for this view. As pointed out in the course of the opinion in *Dwy* v. *Connecticut Co.*, 89 Conn. 74, the same result is reached by travelling several different roads: the cause of action for the injury, being one and indivisible, a release of one releases all; one who receives release is deemed to have committed the whole injury and to have satisfied the injured party; conclusive presumption of release of all from the presence of a seal. But the distinguishing feature of this class of cases, whether the instrument considered is under seal or not, is that they adhere to the technical view of the release and do not interpret it according to what must have been the intention of the parties making it. *McBride* v. *Scott*, 132 Mich. 176 (not under seal); *Seither* v. *Phila. Traction Co.*, 125 Pa. 397 (under seal); *Flynn*

v. *Manson,* 19 Cal. App. 400 (not under seal); *Ruble* v. *Turner,* 2 H. & N. (Va.) 38 (not under seal); *Farmers' Savings Bank* v. *Aldrich,* 153 Ia. 144 (not under seal); *L. & N. Rr. Co.* v. *Allen,* 67 Fla. 257 (under seal); *Ducey* v. *Patterson,* 37 Colo. 216 (not under seal).

Where it has been sought to avoid the technical effect of a release to one joint tort-feasor, the courts have been put to some ingenuity to find a basis for their decisions. The most common solution is to treat a release containing the reservation in question not as a release, but as a covenant not to sue, which does not discharge the cause of action. When given to a sole tort-feasor a covenant not to sue may be pleaded in bar of an action against him to avoid circuity of action, but when there are two or more joint tort-feasors and the covenant is with one of them it does not operate as a release either of the covenantee or the other tort-feasors. The former must resort to an action for breach of covenant if he is sued, and the latter cannot invoke the covenant as a bar. *Chicago* v. *Babcock,* 143 Ill. 318. It is stated that in England a transaction in the form of an actual release, whether by deed or accord and satisfaction, will be construed as being merely a covenant not to sue if it contains an express reservation of the right to proceed against the other wrong-doers. SALMOND, TORTS, [2d Ed.] 74, citing *Duck* v. *Mayeu,* (1892) 2 Q. B. 511; *Bateson* v. *Gosling,* (1871) L. R. 7 C. P. 9. In *Gilbert* v. *Finch,* 173 N. Y. 455, the court reversed its former holdings and adopted this view. It did not appear in that case whether or not the instrument was under seal, but in *Walsh* v. *Hanan,* 87 N. Y. Supp. 930, the rule was applied to such a release. See 16 HARV. L. REV. 529 for New York holdings. To the same effect are *Carey* v. *Bilby,* 129 Fed. 203; *Edens* v. *Fletcher,* 79 Kan. 139; *Kropidlowski* v. *Pfister and Vogel Leather Co.,* 149 Wis. 421. This doctrine, though it undoubtedly leads to a result in accord with the intention of the parties is at best an artificial rule of interpretation and has been criticized as amounting to judicial legislation. See 24 YALE L. JOUR. 505, commenting on the *Dwy* case.

Where effect is given to the reservation in a release, the damages of the releasor, in his later suits against remaining tort-feasors, are reduced by the amount received in consideration for the release. In *Ellis* v. *Esson, supra,* a case involving trespass to real property, it was suggested that such *pro tanto* reduction is possible only where the damages are subject to computation, as in that case, but when they rest mainly in the discretion of the court and jury a release to one would not be interpreted as a covenant not to sue but as a technical release discharging all. Though this point was necessarily overruled by the later Wisconsin case cited above, where a release with reservations was construed as a covenant not to sue in an action involving personal injuries due to acid burns, it has found its way into other decisions. *Matheson* v. *O'Kane,* 211 Mass. 91. That this situation involves no real difficulty was shown in *City of Covington* v. *Westbay, supra,* where a release to one for $750 was held no bar to an action against other joint tort-feasors though the damages were conjectural, the action being for personal injuries. The jury were instructed to find for the plaintiff only if the damage was in excess of $750 and then to the extent of the excess only. This distinction is not

generally taken and is criticized in *Robertson* v. *Trammell*, 83 S. W. 258 (Tex.); 111 Am. St. Rep. 286.

One or two other doctrines that incline away from the technical view might be examined. In *Blackmer* v. *McCabe*, 86 Vt. 303, it was said that a release under seal discharges all, but when not under seal all are not discharged unless it appears that payment has been made in full satisfaction of the wrong done. In Missouri, where private seals have been abolished, it is said that for a release to one to bar an action against other joint wrongdoers it must express full satisfaction of plaintiff's claim or declare a release in express terms. See *Judd* v. *Walker*, 158 Mo. App. 156, in which effect was given to reservation in a release. In both these jurisdictions it is probable that a reservation of further actions is held to indicate that full satisfaction has not been received. See *Chamberlain* v. *Murphy*, 41 Vt. 110. In Minnesota it seems that if an instrument is a release, it is a release of all, even though a reservation is made, but if a covenant not to sue, it has no such effect. Ann. Cases 1913-B 271, commenting on *Musolf* v. *Duluth Edison Electric Co.*, 108 Minn. 369. A similar statement is made by the Massachusetts court in *Matheson* v. *O'Kane, supra*, but exactly what constitutes a release in these states is difficult to define. It is clear, however, that something more than the presence of a reservation of plaintiff's action against remaining tortfeasors is necessary to induce the court to construe the instrument as a covenant not to sue.

In the main opinion of the *Dwy Case* a rule of interpretation is worked out which seems more satisfactory than simply calling a release with reservation of further actions against those not released, a covenant not to sue. It gives effect to the intention of the parties without doing especial violence to the common law idea of the release. The release in that case was under seal and contained the reservation under consideration. Adopting the reasoning in that case it is submitted that the ultimate test in considering the effect to be given to releases is the satisfaction of the injured party. It is true that he is entitled to but one satisfaction, but some courts, in their anxiety to apply this rule have often precluded the attainment of full satisfaction for the wrong done. A release is of no peculiar value except as it is an indication of the receipt of satisfaction, and whether there has been full satisfaction should be determined from the language used by the parties in the instrument. The old rule recognized a satisfaction in law from the presence of the seal. Consistently with this doctrine, reservations of further rights of action were considered repugnant to the release and void. The necessity for so holding when the instrument is unsealed is difficult to see, though that result has been reached in a number of cases cited above. It is doubtful if it is a necessary consequence of the presence of the seal, even where a seal is held to furnish conclusive proof of full satisfaction. This "conclusive proof" should not go beyond the words of the instrument. When the release is absolute, no question can arise; but the presumption should in all cases go only to the discharge the instrument by its terms makes. Where it expressly reserves further rights of action, the presumption of satisfaction may very well be conclusive so far as the releasee is concerned, but it is doing violence to the in-

tention of the parties as expressly set forth to allow the seal to import full satisfaction against the other wrongdoers. This is substantially the position of the court in the *Dwy* case, which is approved in the principal case, with extended quotations. The Ohio court says that written releases are to be treated as contracts between the parties, stating, "There is nothing peculiar or exceptional about contracts of release, or contracts not to sue or contracts to cease prosecuting a suit. They are presumably to be construed, if in doubt, by the same rules of arriving at the intention of the parties as any other kind of contract." For recent collections of cases with annotations and comment see 92 Am. St. Rep. 872; 111 Am. St. Rep. 282; CHAPIN, TORTS, (1917) § 37. L. E. W.

LIBEL WITHOUT INTENT.—Cases like the one put to the jury by Lusk, J. in *Harrison* v. *Smith*, 20 L. T. at p. 715, that "If the character had been purely imaginary, a creature of fancy, then, although it turns out that the plaintiff bears the name of the fictitious character, it would not be a libel at all" fairly raise the question whether or not intent is an essential element of a libel. This question is, without hesitancy, answered by law writers in the negative. ODGERS, LIBEL AND SLANDER, [5th Ed.] p. 4; *Whiting* v. *Carpenter* (Nebr., 1903) 93 N. W. 926; *Sisler* v. *Mistrot* (Tex., 1917) 192 S. W. 565; *Nash* v. *Fisher*, 24 Wyo. 535, 542. But what is meant by "intent"? The term is used in various senses. It may denote an exercise of the will-power such as is requisite to constitute a voluntary act. When the term is used in this sense, intent is not essential to the tort under discussion, for a lunatic is liable for libel. *Ullrich* v. *N. Y. Press Co.*, 50 N. Y. Supp. 788, *Dickinson* v. *Barber*, 9 Mass. 225.

If by "intent" is meant a design to produce certain results, the question of the essentiality of malice is presented. Upon this question there has been much confusion in the decisions, but "the different views, while the cause of much controversy and misunderstanding, do not in fact create divergence in the substantive law of defamation, as their ultimate effect is identical." 25 CYC. 372. The "ultimate effect" referred to is that if the publication is not justified by proof of its truth or by the privileged occasion of its publication, malice need not be proved to recover compensatory damages. 25 CYC. 374; *Sisler* v. *Mistrot*, *supra*. Hence, it is no defense that the defendant did not intend to injure the plaintiff (*Curtiss* v. *Mussey*, 6 Gray (Mass.) 261, 273; *Nash* v. *Fisher*, *supra*; *Haire* v. *Wilson*, 9 B. & C. 643) for every person is presumed to have intended the natural and probable consequences of his own acts. *Morris* v. *Sailer*, (Mo., 1911) 134 S. W. 98; *Hamlin* v. *Fantl*, 118 Wis. 594.

In a still different sense, the question of "intent" arose in the recent case of *Corrigan* v. *Bobbs-Merrill Co.*, (N. Y., 1920) 126 N. E. 260, *viz.*, whether or not there must be an intent to publish "of and concerning" the plaintiff. In this case, the defendant had published a novel supposing the names used and contents to be purely fictitious, but, in fact, part of the book constituted a libelous attack upon the plaintiff, describing him as one "Cornigan." The court, in holding defendant liable, irrespective of the question of intent to publish "of and concerning" the plaintiff, quoted from Holmes, J. in *Peck* v.

Tribune Co., 214 U. S. 185, "If the publication was libelous, the defendant took the risk. As was said by Lord Mansfield, 'whatever a man publishes, he publishes at his peril.'"

A somewhat different question was decided in *Hanson* v. *Globe Newspaper Co.*, 159 Mass. 293, where the plaintiff's name was mistakenly used in a libelous news item. In considering the question of intent, the court said that extrinsic evidence is admissible to show to whom the defendant intended to apply his remarks, citing *Smart* v. *Blanchard*, 42 N. H. 137; *Goodrich* v. *Davis*, 11 Metc. 473, 480, 484, 485; *Miller* v. *Butler*, 6 Cush. (Mass.) 71.

The case of *Smith* v. *Ashley*, 11 Metc. (Mass.) 367, was, in its facts, almost identical with the *Corrigan Case*, and the court held the publisher not liable because he had no knowledge that the story referred to any existing person; hence, no intent to publish "of and concerning" the plaintiff. The court said, "To charge the defendant, it must be proved that he published the libel wrongfully, and *intentionally*, and without just cause or excuse."

In accord with the *Corrigan Case* is the leading English case of *Hulton & Co.* v. *Jones*, [1910] A. C. 20, where the decision rested on the principle that the law looks at the tendency and consequences of the publication, not at the intention of the publisher. Said Lord Loreburn, L. C., on p. 24, "He (defendant) cannot show that the libel was not of and concerning the plaintiff by proving that he never heard of the plaintiff. His intention * * * is inferred from what he did. His remedy is to refrain from defamatory words." Fletcher Moulton, L. J., dissented, saying, "It is, to my mind, settled law that a defendant is not guilty of libel * * * unless he intended (the defamatory writing) to refer to the plaintiff." See articles supporting the majority, 60 U. OF PA. L. REV. 365, 461; 23 HARV. L. REV. 218; supporting the minority, 58 U. OF PA. L. REV. 166-169; 25 LAW QUART. REV. 341. The English case differs from the *Corrigan Case* and *Smith* v. *Ashley* in that both the publisher and the author of the novel intended and supposed it to be purely fictitious, both as to names and contents, whereas in the *Corrigan Case* and *Smith* v. *Ashley* the author apparently intended to attack the plaintiff. But this difference seems immaterial, because the intent of the author would not be imputed to the publisher anyway.

It is indisputable that *Hanson* v. *Globe Newspaper Co.*, *supra*, is overwhelmed by contrary authorities of other jurisdictions. See *Taylor* v. *Hearst*, 107 Cal. 262; *Hulbert* v. *New Nonpareil Co.*, 111 Iowa 490; *Peck* v. *Tribune Co.*, 214 U. S. 185; *Every* v. *Evening Pub. Co.*, 144 Fed. 916. And it seems that if "intent" is not essential to liability for defamatory publications when the term is used to denote "an exercise of the will power" (see *supra*) nor when it denotes "a design to produce certain results" (also *supra*), it is an inconsistency in principle to hold that intent to publish "of and concerning" the plaintiff is essential to the liability of the defendant. It is worthy of notice that the Massachusetts decisions are inconsistent *inter se* in this respect. *Cf. Smith* v. *Ashley* (1846) *supra*, *Curtis* v. *Mussey* (1856) *supra*, and *Hanson* v. *Globe Newspaper Co.* (1893), *supra*. L. K.

RECOVERY OF LIFE INSURANCE WHEN INSURED DIED IN MILITARY SERVICE —A group of very recent cases, representative no doubt of many others pending, involve an interesting and important question as to the construction of military and naval service clauses in life insurance policies. These clauses which have been common in policies, at least in those issued in the last few years, while varying in wording—and these variations may be vitally important,—provide in general that if the insured meets death while engaged in military or naval service the liability of the insurer shall be limited to the premiums paid, unless permission to engage in such service shall have been obtained from the company and an extra payment made.

The question which has troubled the courts has been whether recovery of the full amount of the insurance should be denied if it appears merely that the insured died *while* in service, or if the company escapes such liability only when it appears that service *caused* death. In other words, does the provision in question raise simply a question of *status?* or does it involve the more troublesome problem of *causation?* The large number of deaths at the camps and even abroad from the influenza epidemic and other common diseases to which civilians were by no means immune has already resulted in a number of reported decisions.

At the outset there may be placed on one side those policies where the wording expressly requires for exemption from full liability a causal relation between the service and death. Such a case was *Kelly* v. *Fid. Mut. Life Ins. Co.,* (Wis.) 172 N. W. 152 (1919), where the insured was killed while riding a motorcycle in the performance of his duties as supervisor of construction and operation of sawmills, 100 miles back of the front in France. The policy contained provision that "If insured shall * * * engage in any military or naval service * * * and shall die within two years of the date of this policy as a result, directly or indirectly, of engaging in such service or work," the liability of the company should be limited to return of premiums paid. The court concluded that the military service was not the cause of death, the deceased not having been exposed to any more hazard than any other motorcycle rider, and that the company was therefore not liable for the full sum. So also *Malone* v. *State Life Ins. Co.,* (Mo. App.) 213 S. W. 877 (1919), where the insured died while at Jefferson Barracks "of accidental gunshot wound in abdomen, in line of duty." The court held there was no proof that death was the "result of such service." The only question about these cases is whether there was not really a causal connection between service and death. It is probably safe to say that if the insured in both these cases had been killed while doing what they were in the course of an employment and questions had arisen whether the injuries had arisen "out of" such employment so as to be covered by the usual Workmen's Compensation Act, it would have been held that there was sufficient causal relation. See 16 MICH. L. REV. 179; 17 MICH. L. REV. 280. Of course in these compensation cases the natural tendency is to make the Act inclusive, while in the insurance cases there surely is no disposition normally to let out the company, the *rule of construction* is properly against it. The above cases, however, hardly turned on *construction.*

The tendency to construe insurance contracts strictly against the insurer is well shown by *Redd* v. *American Central Life Ins. Co.*, 200 Mo. App. 383 (1918). The application there read "That active service in the army or navy, in time of war, shall invalidate said contract of insurance, unless a permit," etc.; and the policy provided: "In case of death from service in war without permission from the company, the full reserve for this policy at the time of such death only will be paid." The court (Ellison P. J., dissenting) concluded that the insured, who had died of pneumonia while stationed at Fort Riley, was not in "active service."

In *Miller* v. *Ill. Bankers Life Ass'n.*, (Ark.) 212 S. W. 310 (1919), the policy provided that recovery was to be limited to amounts actually paid to company if death occurred "while in the service of the Army or Navy of the government in time of war." In an opinion by McCullough, C. J., the court held that these words referred to the period of time during which the insured was in service in the army and therefore since the insured died of pneumonia while at camp after induction into the army recovery should be limited to the premiums paid. This case was distinguished in *Benham* v. *American Central Life Ins. Co.*, (Ark.) 217 S. W. 462 (1920), where the provision in the policy limited recovery to the reserve thereon if death occurred "while engaged in military or naval service in time of war, or in consequence of such service." Stress was placed on the word "engaged." The court (Smith, J., dissenting, and McCullough, C. J., not participating) said "word 'engaged' denotes action. * * * So here the words 'death while engaged in military service in time of war' mean death while doing, performing, or taking part in some military service in time of war; in other words, it must be death caused by performing some duty in the military service." The insured having contracted influenza while en route from Cornell University, where he had been sent for special training, to Camp Dick to await assignment, from which he died, the court concluded the full amount of the policy was recoverable. Again in *Nutt* v. *Security Life Ins. Co. of America*, (Ark.) 218 S. W. 675, where the insured died of influenza contracted in camp, the court held (McCulloch, C. J. and Smith, J., dissenting) the *Benham Case* controlling, the policy in the later case containing language almost identical with that in the earlier.

In *Myli* v. *American Central Life Ins. Co. of Des Moines, Iowa*, (N. D.) 172 N. W. 631 (1919), a similar ruling had been made by the Supreme Court of North Dakota. Though the court seemed ready to decide that way on the wording of the clause under consideration—the policy here, as in the last two Arkansas cases, contained the word "engaged"—other provisions in the policy were also relied upon to sustain the conclusion. There were provisions for payment of $4000 in the event of the death of the insured * * * while this policy is in full force, by bodily injury effected exclusively by external accidental means, not including * * * nor resulting from military or naval service in time of war," etc., and for payment of benefits in case of disability, with an exception of certain injuries for which benefits were not to be paid as follows: "Excluding * * * injuries resulting from military or naval service in time of war." It was argued that since these provisions clearly made mere status no

ground for limited liability, it could not have been so intended in the clause on which the case turned, and to hold otherwise would lead to the obviously absurd result of allowing in a possible case a recovery of $4000 for death of insured by accident while in service where such service was not a cause, and a refusal of recovery even as to the $2000, the face of the policy, if the insured while in service died of natural causes to which conditions of service did not contribute.

In the latest case, *Reid* v. *American Nat. Assurance Co.*, (Mo. App.) 218 S. W. 957 (Feb. 28, 1920), where the policy contained the usual provision, "* * * if the insured shall die * * * while engaged in naval or military service in time of war," etc., the court in reversing the lower court said: "There is nothing in this policy contract warranting the instruction that in order to escape military liability there must be a finding, not only that the deceased was engaged in military service at the time of his death, but that such death was in consequence of such service." The court cites, in addition to a few of the cases above, *LaRue* v. *Kansas Mut. Life Ins. Co.*, 68 Kan. 539, and *Welts* v. *Conn. Mut. Life Ins. Co.*, 48 N. Y. 34, but netiher of these cases sheds any light on the precise question here considered.

In most, if not all, of these cases it might be reasonably urged that service conditions, particularly exposure and crowded camps with inadequate health facilities, had caused or at least contributed to the illness and death. Probably there are available somewhere data showing whether the men in service ran greater risks than did civilians. In the cases above, however, there is not manifested a disposition to inquire very particularly along these lines.

There are other insurance cases which may fairly be cited in this connection. In *Graves* v. *Knights of Maccabees*, 199 N. Y. 397 (1910), there was involved a by-law of defendant providing: "No person shall be eligible for membership in the Order who is engaged either as principal, agent or servant in the manufacture or sale of * * * liquors as a beverage, and should any beneficial member of the order engage in any of the above prohibited occupations after his admission, his benefit certificate shall become null and void," etc. The insured had formed a partnership with his son to conduct a saloon business, but, though insured lived in same house, he took no part in handling the business. The insurance was held avoided, rejecting argument that there was no avoidance unless insured actually and physically participated so as to be subject to special hazards. The court said it was defendant's privilege to determine what risks it would run and it evidently thought these were moral or physical hazards in the prohibited businesses. It was further said there was no case cited controlling the point, and the "issue may seem somewhat close." Rule of the case was applied in *Rauber* v. *Mutual Life Ins. Co.*, 156 App. Div. 446 (1913). See also *Sovereign Camp of Woodmen of the World* v. *Akins*, (Tex., 1920) 219 S. W. 492.

In the field of fire insurance there are questions sufficiently like the one under consideration to make the decisions thereof applicable. In *Thuringia Ins. Co.* v. *Norwaysz*, 104 Ill. App. 390 (1902), in an action on a fire insurance policy it appeared that in violation of a provision therein the insured had kept gasoline on the premises. It was held that there was no liability, though

there was no showing that the presence of the gasoline either caused or contributed to the fire. "Nor is it necessary to show in order to maintain a defense upon a policy like the one in controversy, that the fire occurred by reason of the violation in such respect of the terms of the policy. The question is whether the condition of the policy has been violated." Citing *Turnbull* v. *Home Fire Ins. Co.*, 163 N. Y. 237. So also *Bastian* v. *British American, Etc. Co.*, 143 Cal. 287 (1904), the court saying "If it were incumbent on the insurer in each case to prove that the fire was caused by dynamite being on the premises, it would render the clause in most cases of no affect;" *Kensfick-Hammond Co.* v. *Fire Ins. Soc.*, 205 Mo. 294 (1907); *Boyer* v. *Fire Ins. Co.*, 124 Mich. 455 (*semble*).

It would seem, then, that the holdings of the courts in these cases turning on the military service clause that a causal relation between the service and death must be shown in order to warrant a denial of recovery of the full amount are out of harmony with the decisions in cases fairly analogous. If there were real occasion for construction, of course it would be proper to resolve the doubt against the company in favor of the insured. It is submitted that in these cases there has been no room for such construction, not even with the word 'engaged.' To require the insurer to show a causal connection between the service and death would be to open the door to inquiries which in many cases could not be satisfactorily answered and would impose a burden on the company which as said by the California court in the *Bastian Case, supra,* "would render the clause in most cases of no effect."

R. W. A.

STOCK DIVIDENDS AND THE FEDERAL INCOME TAX.—A question which has interested the legal profession and those of the public owning stock in prosperous corporations has recently been decided by the Federal Supreme Court. It was held, four justices dissenting, that stock dividends are not taxable as income. *Eisner* v. *Macomber*, — U. S. — (1920) 40 Sup. Ct. 189. The tax in question was assessed under the Federal Income Tax Law of 1916, which provided in Part I, § 2, (a):—"That the term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation * * * out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation * * *, which stock dividend shall be considered income, to the amount of its cash value." The court held this section invalid as contrary to Art. I, Sect. 2, Cl. 3, of the Constitution, which provides that all direct taxes shall be apportioned among the several states according to population, the court deciding that the word 'income' in the Sixteenth Amendment did not include stock dividends notwithstanding the construction Congress attempted to put upon the word.

Although four members of the court dissented, two of those four differed from the majority only on the construction of the word 'income' as used in the Sixteenth Amendment. The other two justices differed radically from the majority on the question of the nature of a stock dividend, taking the position that there was no difference between a dividend in cash and a dividend in

stock. There is considerable authority for this position. In the case of *Tax Commissioner* v. *Putnam*, 227 Mass. 522, a stock dividend was held to be taxable as income, the court stating at p. 535;—"It was the issuance to the stockholder of a new thing of value, transferable, transmissible, and salable separate and apart from that which before he had possessed." It is worth noting that this statement was by the highest court of the state which has given the name to the rule that stock dividends are capital and not income as between life tenant and remainder man. *Minot* v. *Paine*, 99 Mass. 101. See also 13 MICH. L. REV. 242; 18 MICH. L. REV. 69.

A recent appeal case from Australia also supports the theory of the dissenting justices. It was held in *Swan Brewery Co., Ltd.*, v. *Rex*, [1914] A. C. 231, under a statute putting a tax on 'dividends,' that a transaction, whereby certain surplus was charged to capital account and new shares issued *pro rata* to stockholders, was a 'dividend' and taxable under the act. "There can be no doubt that the new shares were distributed and were not the same things as the old ones." *Id.* p. 235. In both this case and the *Putnam case, supra*, the courts make the comparison between a 'straight' stock dividend and an optional 'cash-for-stock' dividend on which Justice Brandeis places great stress in the instant case. The court says,—"Had the company distributed the (money) among the shareholders and had the shareholders repaid such sums to the company as the price of the * * * new shares, the duty on the (money) would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is." *Swan Brewery Co. case, supra*, p. 236. This argument is plausible but it must be borne in mind that there is the same difference between such an optional 'cash-for-stock' transaction and a straight stock dividend that there is between the latter and a cash dividend. Moreover, such 'cash-for-stock' dividends are anything but straightforward transactions and have a tendency to deceive the stockholders and to take advantage of their ignorance or need of ready money. Since the price at which the new stock is offered is necessarily less than the actual value, (otherwise the scheme would not be workable), such an arrangement is well calculated to squeeze out the small stockholders and puts a premium on 'inside' knowledge. If the increase in stock is bona-fide there is no reason why any such optional arrangement should be made.

There are many reasons for believing that a stock dividend is essentially different in kind from a cash dividend. "It is the characteristic feature of a stock dividend that the property of the corporation itself remains unchanged, but that each one of the shares of the increased capital stock represents a smaller fractional interest than before in the total amount of the corporate property. On the other hand it is the characteristic feature of a dividend declared and paid wholly from the net profits or undivided earnings that it does diminish the property of the corporation by exactly the amount of the dividend so paid out, while it leaves the fractional interest represented by each share of the capital stock exactly what it was before." *Gray* v. *Hemenway*, 212 Mass. 239, 241, citing *Gibbons* v. *Mahon*, 136 U. S. 549. "A stock dividend gives the stockholder merely the evidences of additions made by the corporation to its own capital. He can, it is true, still retain the old stock certificates

and sell the new ones, but by so doing he parts with so much of his interests in the capital of the corporation." *DeKoven* v. *Alsop*, 205 Ill. 309, 314. The court states the proposition forcibly in *Towne* v. *Eisner*, 245 U. S. 418, (holding stock dividends not taxable as income under the Law of 1913). The court says, at p. 426,—"* * * if certificates for $1000 par were split up into ten certificates each, for $100, we presume that no one would call the certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new."

A leading text-writer on this subject says that income "* * * is not synonymous with 'increase.' The value of corporate stock may be increased by good management, prospects of business, and the like, but such increase is not income. It may also be increased by the accumulation of a surplus fund. But so long as that surplus is retained by the corporation, either as a surplus or as increased stock, it can in no proper sense be called income. It may be income-producing, but it is not income." BLACK, INCOME AND OTHER FEDERAL TAXES, [3rd. Ed] Sect. 100.

Another writer expresses his view of the subject in a novel manner. "No one had the temerity to use this expression about a stock dividend—*it is nothing at all* * * * just like receiving five ones for a five-dollar bill." MONTGOMERY, INCOME TAX PROCEDURE, p. 188. He proceeds to explain, pp. 214, 215,—"It cannot be shown that the stockholder had a greater proportion of the company's net worth than before; it cannot be shown that the company distributed one dollar of its assets—the whole strength in the argument lies in the statement that he has a piece of paper which recites that he has become possessed of a certain specific part of the corporation's new capital stock, that it is now called capital on the books, whereas shortly before it was called surplus, and that said surplus account having once been divided it can never be divided again, so he is on notice that he will not get another dividend from the same surplus. * * * We are reduced to an examination of one argument, viz., that so long as the amount of the dividend was in surplus account it might be dissipated, and that it was more secure when called capital stock. * * * As a matter of fact the argument is so weak that it falls with its own weight. * * * There is no such thing as dissipation of surplus; if dissipation is going on it is of assets, and bad management in dissipating assets goes on regardless of whether there is a surplus account on the books or whether the assets being dissipated represent capital stock."

If the majority of the court was correct in its conclusion on this point, and the authorities cited *supra* seem to support it, the court's construction of the word 'income' in the Sixteenth Amendment was certainly justified. The Sixteenth Amendment did not extend the power of taxation to new or excepted subjects, but merely removed the occasion for apportioning taxes on income among the states. *Peck & Co.* v. *Lowe*, 247 U. S. 165. There is nothing in the wording of the amendment which should cause the courts to abandon its own prior definitions of 'income.' "Whatever difficulty there may be about a precise and scientific definition of 'income,' it imports * * * some-

thing entirely distinct from principal or capital either as a subject of taxation or as a measure of the tax * * *." *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179, 185.

Similar definitions of income were approved by the court long before the decision in *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, which reversed the previous holdings that an income tax was an excise tax and so made necessary the adoption of the Sixteenth Amendment before the present Income Tax Law could be enacted. Under the Income Tax Law of 1867, the increased value of bonds over their cost price was held not to be income. *Gray* v. *Darlington*, 15 Wall. 63. A federal court, in construing the Income Tax Law of 1870, stated: "In the absence of any special provision of law to the contrary, income must be taken to mean money, and not the expectation of receiving it, or the right to receive it, at some future time." *U. S.* v. *Schillinger*, 14 Blatch. 71. It may perhaps be said that the court in the principal case showed little regard for the interpretation of the Sixteenth Amendment favored by the legislative branch of the government, but it can hardly be denied that the ultimate interpretation of the Constitution is for the judicial, and not the legislative department of government.

It was contended by the government in this case that since Congress could tax the increased assets as income to the corporation, therefore it should be considered as income to the stockholder. This is in effect to urge double taxation, not as an anomaly to be tolerated, but as a principle to be followed as of right. On the contrary the fact that Congress might conceivably tax this same increased value in a different way is one very good reason for not taxing it in this way. R. L. C.